Final Brief **Oral Argument Not Yet Scheduled**

CASE NO. 17-1191 and 17-1206

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

THYME HOLDINGS, LLC D/B/A WESTGATE GARDENS CARE CENTER,

Petitioner/Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner,

and

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 2015,

Intervenor

ON APPEAL FROM NATIONAL LABOR RELATIONS BOARD
CASE NO. 365 N.L.R.B. NO. 118

BRIEF OF INTERVENOR SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 2015

David A. Rosenfeld, Bar No. 058163
WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
Telephone (510) 337-1001
Fax (510) 337-1023

Attorneys for Intervenor **SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 2015**

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for Intervenor, Service Employees International Union Local 2015 ("Intervenor") certifies the following:

A. Parties and Amici

Thyme Holdings, LLC d/b/a Westgate Gardens Care Center was the Respondent before the Board in the above-captioned case and is Petitioner/Cross-Respondent in this court proceeding. The Board's General Counsel was a party before the Board. Service Employees International Union Local 2015 was the Charging Party before the Board and is the Intervenor in Support of the Board.

B. Rulings Under Review

The case under review is a Decision and Order of the Board, issued on August 16, 2017, and reported at 365 N.L.R.B. No. 118, which relies on the findings of the Board's Regional Director for Region 32 in an earlier representation proceeding. The Regional Director's findings in the representation proceeding are contained in an unpublished Decision and Direction of Election, which issued on October 27, 2016.

C. Related Cases

This case has not previously been before this Court. The Intervenor is not aware of any related cases either pending or about to be presented before this or any other court.

Dated: February 15, 2018

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

/s/ David A. Rosenfeld
By: David A. Rosenfeld
Attorneys for Intervenor SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 2015

CORPORATE DISCLOSURE STATEMENT

Intervenor, Service Employees International Union Local 2015 is an unincorporated association and a labor organization.

Dated: February 15, 2018

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

/s/ David A. Rosenfeld
By: David A. Rosenfeld
Attorneys for Intervenor SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 2015

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* Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY

Act	National Labor Relations Act
Board	National Labor Relations Board
CNA	Certified Nursing Assistant
LVN	Licensed Vocational Nurse
SEIU 2015	Service Employees International Union, Local 2015
Thyme Holdings	Thyme Holdings, LLC d/b/a Westgate Gardens Care Center

I. STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

ISSUE PRESENTED

THE CASE AND THE FACTS

Intervenor incorporates, by reference, Statements of Subject Matter and Appellate Jurisdiction, the Issue Presented, the Case and the Facts as contained in the Brief of the National Labor Relations Board.

II. SUMMARY OF THE ARGUMENT

In this long term care facility, there were eighty CNAs. There were according to the employer approximately fifty-five supervisors, including the thirty-seven disputed LVNs in this case. (J.A. 477.) The claim that there were virtually as many supervisors as there are workers undermines the argument that LVNs are supervisors.

The job descriptions that the employer offered are contradictory and offer no support for the employer's argument that the LVNs are supervisors.

The employer implemented an evaluation system at the same time as an organizing effort at a related facility. Its implementation was incomplete and failed to establish the supervisory status of the LVNs. The LVNs had no training with respect to the evaluation function or any other supervisory function. This supports the finding of the Board that the evaluation function had no impact. Thyme failed to show that the evaluations had any impact on wages.

The failure to provide evidence that the evaluations and warnings led to any demonstrable discipline undermines the employer's argument that the LVNs are supervisors.

In all other regards, the Intervenor adopts the Arguments made by the National Labor Relations Board.

III. ARGUMENT

The Intervenor fully supports the brief of the National Labor Relations Board and the Decision of the Board rejecting the employer's claim that the LVNs are supervisors. We add a few additional points in support of the Board's position.

The burden of proving supervisor status is squarely on the party asserting the supervisory status of employees. This Court recently reaffirmed the basic principles regarding review of Board decisions on supervisory status:

> As the party asserting during the first hearing that the employees were supervisory, Allied bore the burden of proof. *Ky. River Cmty. Care, Inc.*, 532 U.S. at 711-12. We must sustain the Board's decision that Allied failed to carry that burden unless it is "contrary to law, inadequately reasoned, or unsupported by substantial evidence." *Brusco Tug & Barge Co. v. NLRB*, 247 F.3d 273, 276, 345 U.S. App. D.C. 411 (D.C. Cir. 2001) (citation omitted). Given the Board's expertise, it enjoys a large measure of discretion on the question. *Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981, 988, 346 U.S. App. D.C. 166 (D.C. Cir. 2001). The Board's findings of fact are conclusive so long as they are "supported by substantial evidence on the record considered as a whole." See 29 U.S.C. § 160(f). "Put differently, we must decide whether on this record it would have been possible for a reasonable jury to reach the Board's conclusion." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 366-67, 118 S. Ct. 818, 139 L.Ed.2d 797 (1998).

Allied Aviation Serv. Co. v. NLRB, 854 F.3d 55, 65 (D.C. Cir 2017), *cert. denied*, 138 S.Ct. 458 (2017). *See also Brusco Tug & Barge, Inc.*, 362 N.L.R.B. No. 28 (Mar. 18, 2015), *enforced Brusco Tug & Barge, Inc. v. N.L.R.B.*, 696 F. App'x 519 (D.C. Cir. 2017).

1. One of the secondary indicia of supervisory status is the ratio of supervisors to non-supervisors. Thyme Holdings does not address this issue and it

is worth quoting at length the analysis by the Regional Director in her Decision finding that the LVNs were not supervisors:

> 2. Ratio of Supervisors to Non-Supervisors
>
> I must also address the ratio of supervisors to non-supervisors if I were to find that the LVNs constitute statutory supervisors as the Employer contends. In the instant case, DSD Hussain testified that the Employer employers 80 CNAs. A ratio of 55 supervisors (i.e., 37 LVNs, 12 RNs, 2 ADONs, 1 DON, 1 DSD, 1 NOC Supervisor, and 1 Administrator) to 80 non-supervisory CMAs is an improbably high ratio that militates against a finding of supervisory status. See *NLRB v. GramCare*, 170 F.3d 662, 667 (7th Cir. 1999) (en banc) (where finding of supervisory status would result in ratio of 59 supervisors to 90 nonsupervisors, "such a highly improbable ratio of bosses to drones 'raises a warning flag'"); *Beverly California Corp. v. NLRB*, 970 F.2d 1548, 1555-1556 (6th Cir. 1992) (classifying 25% of nursing home staff as supervisors makes ranks of supervisors "pretty populous,"); *NLRB v. Res-Care, Inc.*, 705 F. 2d 1461, 1468 (7th Cir. 1983) (33% ratio found to be high); *Airkaman, Inc.*, 230 NLRB 924, 926 (1977) (one to three ratio is unrealistic and excessively high).

(J.A. 477.)

The Regional Director was clearly correct that to find 37 LVNs to be supervisors in addition to eighteen other admitted supervisors for a total of fifty-five supervisors would amount to one supervisor for every 1½ employees. On the other hand, accepting the Board's finding that the LVNs are not supervisors, the ratio would be approximately 117 employees, including eighty CNAs and thirty-seven LVNs to eighteen supervisors. This is a more reasonable ratio and, given the nature of the employer's business, makes sense. The LVNs are more highly skilled and trained. They are, however, not nurses who in many facilities are the supervisors. The CNAs are less skilled and to the extent that they need assistance in performing tasks or some direction, the LVNs are present to give it without

having supervisory status. They do largely interchangeable work. Patient care work is routine and supervision is not needed.

Second, the employer presented a recent Charge Nurse job description, which was produced in July or August of 2016. (J.A. 477-488. *See also* J.A. 569-572.)

No comparable job description was produced for the LVNs or the CNAs. Rather, the employer only had old job descriptions. (J.A. 477-478 and J.A. 792-796.) As the Regional Director found, however, the LVN job description that was offered into evidence made it clear that the LVNs are "under the direct supervision of the RN" and "responsible to the charge nurse." (J.A. 795.) Moreover, the LVN job description contains no suggestion of any supervisory status.

Although job descriptions are not determinative, here the job descriptions support the argument that the LVNs are not supervisors because they provide the locus of that authority lies elsewhere above them.

Third, although the Regional Director, and thus the Board, did not rely on any improper motive, the record demonstrates that the Charge Nurse job description was rolled out in the context of a contemporaneous organizing drive at a related facility. (J.A. 461-462 at n. 4.) This Court, however, should recognize that that new job description for the Charge Nurse (but not the LVN) is suspect and undermines the employer's position that the LVNs were supervisors. As the Regional Director correctly pointed out, the "limited time period in which the LVNs have ostensibly possessed and/or exercised certain of the powers set forth in a new job description is relevant to the assessment of the extent to which such powers have been actually exercised in practice or merely constitute 'paper authority.'" (J.A. 462.)

Fourth, the employer largely relies upon the evaluation forms, which are called "Employee Performance Reviews" for the CNAs. *See* Thyme Holding's Br. at pp. 34-51. (*See also* J.A. 465-469.)

There are several important points to make. The employer did not call any LVNs as witnesses who could corroborate the role that they play in filling out these routine evaluation forms. Second, the witness called by the Union, Abel Gonzales, explained the routine nature of filling out the forms without any personal knowledge of the CNAs and without exercising any real judgment. Nor did he know whether these forms had any impact on the CNAs. (J.A. 467.) Third, the employer failed in the most fundamental regard to prove that the evaluation forms had any impact on wage increases for the CNAs. (J.A. 467.) Fourth these evaluations were recently rolled out again in the context of the related organizing campaign. (J.A. 466.) Thyme had shown that the evaluations actually led to merit increases, a different story would have emerged. *See* Thyme Holding's Br. at p 10. The point we made above about so many alleged supervisors undermines the use an employer could make of evaluations by so many LVNs. Finally, there was so much variation in these evaluation forms that they appear to be random. *See* Br. of NLRB at pp. 7-8. In summary, these evaluations are meaningless.

Fifth, this Court and other courts have rejected the notion that nurses and charge nurses are supervisors in long-term care facilities. *See, e.g.*, *Jochims v. NLRB*, 480 F.3d 1161, 1163 (D.C. Cir. 2007), and *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298 (D.C. Cir 2012). It then is reasonable to find that LVNs who are supervised by admitted supervisory nurses are not supervisors.

In summary, the Board has established that it reasonably found that the LVNs are not supervisors because the employer failed to meet its burden of proving supervisory status.

IV. CONCLUSION

For the reasons suggested in the Brief for the National Labor Relations Board and for the reasons suggested in this Brief, the Board's Decision and Order should be enforced in full.

Dated: February 15, 2018

Respectfully Submitted,

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

/s/ David A. Rosenfeld
By: David A. Rosenfeld

Attorneys for Intervenor SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 2015

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(g)(1), Proposed Intervenor certifies that Brief of Intervenor Service Employees International Union Local 2015 contains 1,524 words of proportionately-spaced, 14 point type, and that the word processing system used was Microsoft Word 2010.

Dated: February 15, 2018

Respectfully Submitted,

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

/s/ *David A. Rosenfeld*
David A. Rosenfeld
Attorneys for *Proposed Intervenor*, SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 2015

CERTIFICATE OF SERVICE

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is1001 Marina Village Parkway, Suite 200, Alameda, California 94501.

I hereby certify that on February 15, 2018, I electronically filed the foregoing **BRIEF OF INTERVENOR SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 2015** with the United States Court of Appeals for the District of Columbia Circuit, by using the Court's CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Notice of Electronic Filing by the Court's CM/ECF system.

I certify under penalty of perjury that the above is true and correct. Executed at Alameda, California, on February 15, 2018.

/s/ Karen Kempler
Karen Kempler